Dr Mahesan & Ors v Ponnusamy & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D4-24-94-94
ZAKARIA YATIM J
30 MAY 1994

Companies and Corporations *— Meetings — Notice — Defective notice — Whether service on clerk proper — Whether five days' notice sufficient — Previous practice of company*

Companies and Corporations *— Meetings — Notice — Defective notice — Whether notice must contain agenda*

Companies and Corporations *— Shares — Allotment of shares — Whether for improper purpose — Whether in good faith*

Civil Procedure *— Jurisdiction — Declaration not prayed for — Whether court had power to make declaration although not prayed for*

The first and third plaintiffs, who were directors in Dr Leela Ratos & Rakan-Rakan (Chow Kit) Sdn Bhd ('the company'), filed two applications for, inter alia: (i) declarations that the 19th board of directors' meeting ('the meeting') held on 25 April 1994 was null and void because insufficient notice had been given, ie the notice was received only on 20 April 1994; and (ii) injunctions restraining the defendants from acting on the resolutions passed at the meeting. The agenda contained in the notice listed one of the items to be discussed as being the allegations of misconduct against the first plaintiff and his removal as managing director, but did not contain particulars of the allegations. The notice was left with the first plaintiff's clerk at his clinic.

The plaintiffs collectively owned 80% of the paid-up capital of the company. The defendants were the other directors of the company and the company secretary. At the meeting, the first plaintiff was removed as managing director and 240,000 new shares were allotted, which effectively transferred control of the company from the plaintiffs to the defendants. The plaintiffs contended that the allotment was contrary to art 14 of the memorandum and articles of the company and asked the court to declare the allotment of shares null and void. However, the originating summons did not contain any prayer to that effect and the question was whether the court had the power to make an order declaring the allotment of shares null and void.

Held, dismissing the applications in part and making a declaration that the allotment was null and void:

(1) Where the memorandum and articles specify the duration of the notice of directors' meetings, the rule must be strictly complied

with. However where, as in this case, the memorandum and articles are silent on the issue, the court has to examine the previous practice in calling directors' meetings. In this case, five days was sufficient notice for the meeting.

(2) An agenda of the business to be transacted at the meeting was not required in law to be given. The plaintiffs had no reason to complain since the particulars of the allegations did not have to be provided in the notice. The notice was valid in law and had been duly served. All proceedings and minutes of the meeting were also valid.

(3) The court can grant a declaration irrespective of whether the applicant has a cause of action and even if the cause of action does not exist at the time of the filing the application. The court's jurisdiction is unlimited subject only to its own discretion.

(4) The court therefore granted a declaration that the allotment of shares was null and void as it was made with improper motive and not in good faith. It was ultra vires art 14 of the articles and contrary to common law principles.

[Bahasa Malaysia summary

Plaintif pertama dan ketiga, yang merupakan pengarah di dalam Dr Leela Ratos & Rakan-Rakan (Chow Kit) Sdn Bhd ('syarikat itu'), telah memfailkan dua permohonan untuk, antara lain: (i) deklarasi bahawa mesyuarat pengarah ke-19 ('mesyuarat itu') yang diadakan pada 25 April 1994 adalah terbatal dan tidak sah kerana notis yang mencukupi tidak diberikan, iaitu notis itu hanya diterima pada 20 April 1994; dan (ii) injunksi untuk menghalang defendan daripada bertindak atas ketetapan yang diluluskan pada mesyuarat itu. Agenda yang terkandung di dalam notis itu telah menyenaraikan satu daripada perkara yang akan dibincangkan sebagai pengataan salah laku terhadap plaintif pertama dan penyingkirannya sebagai pengarah pengurusan, tetapi tidak mengandungi butir-butir pengataan itu. Notis itu telah ditinggalkan dengan kerani plaintif pertama di kliniknya.

Plaintif secara kolektif memiliki 80% daripada modal terbayar syarikat itu. Defendan merupakan pengarah syarikat itu yang lain dan setiausaha syarikat itu. Pada mesyuarat itu, plaintif pertama telah disingkirkan sebagai pengarah pengurusan dan 240,000 saham baru telah diuntukkan, yang secara berkesannya telah memindahkan kuasa pengurusan syarikat itu daripada plaintif kepada defendan. Plaintif menegaskan bahawa untukan itu bertentangan dengan perkara 14 memorandum dan perkara persatuan syarikat itu dan memohon supaya mahkamah membuat suatu deklarasi bahawa untukan itu batal dan tidak sah. Bagaimanapun, saman pemula itu tidak mengandungi permohonan sedemikian dan soalannya adalah sama ada mahkamah mempunyai kuasa untuk membuat suatu perintah yang mengisytiharkan bahawa untukan saham itu batal dan tidak sah.

Diputuskan, menolak sebahagian daripada permohonan itu dan membuat deklarasi bahawa untukan itu batal dan tidak sah:

(1) Di mana memorandum dan perkara persatuan menyatakan tempoh notis mesyuarat pengarah, peraturan itu mesti dipatuhi dengan ketat. Bagaimanapun di mana, seperti di dalam kes ini, memorandum dan perkara itu tidak menyatakan apa-apa tentang isu itu, mahkamah mesti memeriksa amalan dahulu apabila mengadakan mesyuarat pengarah. Di dalam kes ini, notis selama lima hari adalah mencukupi untuk mengadakan mesyuarat itu.

(2) Suatu agenda mengenai perkara yang akan diuruskan di dalam mesyuarat itu tidak perlu diberikan di sisi undang-undang. Plaintif tidak mempunyai sebab untuk membuat aduan kerana butir-butir pengataan itu tidak perlu diberikan di dalam notis itu. Notis itu sah di sis undang-undang dan telah disampaikan dengan betul. Semua prosiding dan minit mesyuarat itu juga sah.

(3) Mahkamah boleh memberikan suatu deklarasi tanpa mengambil kira sama ada pemohon mempunyai suatu kausa tindakan dan walaupun kausa tindakan itu tidak wujud pada masa permohonan itu difailkan. Bidang kuasa mahkamah tidak terhad dan tertakluk hanya kepada budi bicaranya sendiri.

(4) Oleh yang demikian, mahkamah memberikan deklarasi bahawa untukan saham itu batal dan tidak sah kerana ia dibuat dengan motif yang tidak wajar dan bukan bona fide. Ia ultra vires perkara 14 perkara persatuan dan bertentangan dengan prinsip common law.]

Notes

For cases on notice of meetings, see 3 *Mallal's Digest* (4th Ed) paras 101–104.

For a case on allotment of shares, see 3 *Mallal's Digest* (4th Ed) para 174.

For cases on court's jurisdiction to grant declarations, see 2 *Mallal's Digest* (4th Ed) paras 791–792 and 1413–1416.

Cases referred to

Bentley-Stevens v Jones & Ors [1974] 2 All ER 653; [1974] 1 WLR 638 (refd)

Browne v La Trinidad (1888) 37 Ch D 1 (distd)

Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor [1979] 2 MLJ 101 (folld)

Eastern Resources of Australia Ltd v Glass Reinforced Products (GRP) Pty Ltd 10 ACLR 496 (folld)

Eshelby v Federated European Bank Ltd [1932] 1 KB 254; [1931] WN 244 (CA) (not folld)

First Nominee (Pte) Ltd v New Kok Ann Realty Sdn Bhd & Anor [1983] 2 MLJ 76 (folld)

A *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536 (folld)
Harrison-Broadley & Ors v Smith [1964] 1 All ER 867; [1964] 1 WLR 456 (folld)
Hogg v Cramphorn Ltd [1967] Ch 254; [1966] 3 All ER 420; [1966] 3 WLR 995 (refd)
B *Homer District Consolidated Gold Mines, Re* (1888) 39 Ch D 546 (refd)
La Compagnie de Mayville v Whitley [1896] 1 Ch 788 (refd)
Mokhtar v Arumugam [1959] MLJ 232 (refd)
Piercy v S Mills & Co Ltd [1920] 1 Ch 77 (refd)
C *Portuguese Consolidated Copper Mines Ltd, Re* (1889) 42 Ch 160 (refd)

Legislation referred to

Companies Act 1965

D *B Thangaraj* (*Thangaraj & Associates*) for the first and third plaintiffs.
CK Ong (*Lee Ong & Kandiah*) for the defendants.

Zakaria Yatim J: There are two applications before the court filed by the plaintiffs. The first application is by way of originating summons (encl 3) in which the plaintiffs are seeking the order of the court in terms of the
E following prayers:

(a) a declaration that the notice of board of directors' meeting dated 15 April 1994 be declared null and void;

(b) a declaration that the service of the notice of board of directors' meeting dated 15 April 1994 be declared improper and be set aside;
F

(c) a declaration that insufficient time had been given to the first and third plaintiffs to attend the 19th board of directors' meeting and a further order that the board of directors' meeting be adjourned to a date convenient to all directors and/or after the emergency general meeting of Dr Leela Ratos & Rakan-Rakan (Chow Kit) Sdn Bhd to
G be requisitioned by the second and third plaintiffs;

(d) a declaration that all proceedings and minutes of the board of directors' meeting to be held on 25 April 1994 at 6.30pm be declared null and void and of no effect;

(e) an order that an emergency general meeting of Dr Leela Ratos &
H Rakan-Rakan (Chow Kit) Sdn Bhd be called, held and conducted within 28 days from the date of this order and a mandatory injunction against the first defendant to issue the notice of meeting on the date of this order to all members of Dr Leela Ratos & Rakan-Rakan (Chow Kit) Sdn Bhd;

I (f) an injunction be granted against the defendants by themselves, their agents or servants or otherwise be restrained from proceeding with the 19th board of directors' meeting to be held on 25 April 1994 at 6.30pm at 6th floor (conference room) No 415–427, Jalan Pudu,

Kuala Lumpur or to convene any other directors' meeting until after the disposal of the present suit;

(g) costs to be taxed and paid by the defendants to the plaintiffs; and

(h) such further order or other relief as this honourable court may deem fit.

The application is supported by the affidavit of the first plaintiff (Dr Mahesan), affirmed on behalf of the plaintiffs on 25 April 1994.

The other application is by summons-in-chambers (encl 11). In this application the plaintiffs are asking the court to make an order in terms of the following prayers:

(1) That the defendants and each of them whether by themselves, their servants and/or agents or any of them or otherwise howsoever be restrained until the hearing and disposal of the originating summons dated 25 April 1994 from doing the following acts or any of them that is to say:

(a) acting or purporting to act in pursuance of all resolutions passed at the board of directors' meeting held on 25 April 1994 at 6.30pm;

(b) from sending any letters, memos and circulars to any parties stating that the third defendant has been appointed as the managing director of Dr Leela Ratos & Rakan-Rakan (Chow Kit) Sdn Bhd; and

(c) to convene any other board of directors' meeting.

(2) That the second and third defendants be restrained until the hearing and disposal of the originating summons dated 25 April 1994 from entering into the business premises of Dr Leela Ratos & Rakan-Rakan (Chow Kit) Sdn Bhd at No 80, Jalan Haji Hussein, 50300 Kuala Lumpur.

(3) The costs of this application be costs in the cause.

(4) Such further or other reliefs as this honourable court may deem fit.

At the commencement of the hearing of the applications, Mr B Thangaraj, counsel for the plaintiffs, informed the court that he wished to proceed first with the application in the originating summons except for prayers (e) and (f).

The facts of the case are as follows.

Dr Mahesan owns 50% of the paid-up capital in Dr Leela Ratos & Rakan-Rakan (Chow Kit) Sdn Bhd ('the company'). At the material time he was the managing director of the company. On 19 August 1993, he transfered his shares to the second plaintiff. The third plaintiff (Dr Ampikai) is the wife of Dr Mahesan and she owns 30% of the shares of the company. She is also the director of the company.

The first defendant is the company's secretary and he is involved in the management, finance and accounts of the company. The second and third defendants represent Insaf Leela Holdings Sdn Bhd which owns 10%

A of the paid-up capital in the company. Both the second and third defendants are directors of the company. The fourth defendant holds 10% of the shares in the company through her family company, Raleena Holdings Sdn Bhd. Dr Mahesan and Dr Ampikai own 80% of the paid-up capital and both of them are directors of the company. The defendants own 20%
B of the shares. Three of the defendants, viz the second, third and fourth defendants are directors of the company.

From the affidavit of Dr Mahesan and the affidavit of Mr Anthony Ratos (the second defendant) affirmed on 29 April 1994, both the plaintiffs and the defendants had differences over the management of the affairs of
C the company.

On 15 April 1994, the secretary of the company issued a notice of 19th board of directors meeting of the company, which was to be held on 25 April 1994. The said notice which contains the agenda of the meeting is reproduced below:

D Dr Leela Ratos & Rakan-Rakan (Chow Kit) Sdn Bhd
(Incorporated in Malaysia)

Notice of directors' meeting

Notice is hereby given that a directors' meeting of the company will be held at 6.30pm on Monday, 25 April 1994 at 6th floor (conference room)
E No 415–427, Jalan Pudu, 55100 Kuala Lumpur.

Agenda:

(1) Confirmation of the 18th directors' meeting held on 2 December 1993.

(2) Branch clinics opened at Selayang Jaya and Medan Batu Caves.

F (3) A review of the company's accounts for the period 1 September 1993 to April 1994.

(4) General operations of company and clinics.

(5) To discuss allegations against Dr Mahesan for breach of authority, duty and conduct.

G (6) To discuss the removal of Dr Mahesan as managing director and appointment of Mr Anthuan Ratos in his place.

(7) Audited statement of account for the period ended on 31 August 1993. To discuss and approve the draft accounts for the year ended 31 August 1993.

(8) Any other business.

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By order of the board.
—Sgd—
Secretary
Date: 15 April 1994.

I Dr Mahesan averred in his affidavit that he received the notice of the board meeting on 20 April 1994. The notice was left at a table at the clinic. Upon enquiring from the staff at the clinic, he was informed that the notice was left with his accounts clerk on 18 April 1994 and the clerk left the notice on the table.

By a letter dated 21 April 1994, Dr Mahesan wrote to the first defendant asking to adjourn the board meeting scheduled on 25 April 1994 on the grounds that insufficient notice was given to him and the particulars of the allegations against him as contained in the agenda were not given to him. By a letter dated 22 April 1994, the first defendant wrote to Dr Mahesan stating that the board meeting would go on as scheduled.

On 25 April 1994, the meeting of the board of directors was held in the absence of Dr Mahesan and Dr Ampikai. At the meeting the board passed a number of resolutions including a resolution to remove Dr Mahesan as the managing director of the company with immediate effect.

Mr Thangaraj submitted that the notice of the board meeting dated 14 April 1994 did not give sufficient time to Dr Mahesan and Dr Ampikai to attend the meeting. He said that the law requires that sufficient time be given for notice of meeting of board of directors. He cited a number of authorities in support of his submission.

Mr CK Ong, counsel for the defendants submitted that on the question of the notice of the board meeting dated 14 April 1994, the court had to decide: (a) whether the notice was given to the plaintiffs; (b) if the notice was given to the plaintiffs, whether it provided sufficient time for the plaintiffs to attend the meeting; (c) whether the notice provided details as to the nature of the business to be transacted; and (d) whether a written agenda is necessary in law to be given to the directors. He too cited a number of authorities.

I shall now examine the position in law whether the plaintiffs were given sufficient time to attend the board meeting on 25 April 1994. The memorandum and articles of the company are silent on the issue of notice of meeting of directors. The Companies Act 1965, too is silent on this point. It is therefore necessary to examine the position at common law: According to RR Pennington, *Company Law* (6th Ed) at p 575:

> Notice of board meetings should be given to all the directors in sufficient time to enable them to attend. What is sufficient notice depends on the facts at the time ...

In *Re Homer District Consolidated Gold Mines* (1888) 39 Ch D 546, the meeting of board of directors was held at 2 o'clock, two of the directors were given a few hours' notice and they did not attend. One of them received the notice the next day. The other gave notice that he could not attend till three o'clock. The fifth director was abroad and no notice was sent to him. The court decided that the service of the notice of the meeting was bad and the decisions of the board in the absence of the directors were void.

In *Browne v La Trinidad* (1888) 37 Ch D 1, the facts as stated in the headnotes are as follows:

> A meeting of directors passed a resolution to summon an extraordinary general meeting at which were to be proposed special resolutions for removing

A B from the office of director, and for increasing the capital. The articles gave power to remove directors by special resolution. The only notice B had of the board meeting was a notice given less than ten minutes before the time of holding it, and not stating the nature of the business. The notices for the general meeting were issued, and four days before the time for the meeting B, who up to that time had made no complaint of the short notice, B brought his action to restrain the company from holding the meeting, on the ground that the board which summoned it was not duly constituted, as B had not received proper notice and could not attend. The general meeting was held and passed the resolutions. Charles J ... granted an injunction restraining the company from confirming the resolution to remove B.

C The Court of Appeal decided that the injunction ought not to have been granted. In his judgment at pp 16–18, Lindley LJ said:

The power of the board to convene a meeting of the shareholders is contained in cl 56 of the articles, and runs thus: 'The directors may, whenever they think fit, call an extraordinary meeting,' and then it provides that they shall be bound to do so upon such requisition as therein mentioned. D 'The directors may whenever they think fit.' That means, I apprehend, that the directors may do it at a meeting properly convened. I do not think it means that any directors may without consulting the others call an extaordinary meeting. I think that, so far, Mr Marten's argument is right, and if the plaintiff had complained that the meeting of directors convened at such a short notice was not duly convened, and had sought the interference E of the court to prevent the directors from acting on a resolution passed at it, I can understand that he would have had a plausible case. But he did nothing of the kind. He took no notice of the matter. He did not say that it was inconvenient for him to attend, and he did not ask the directors to adjourn it. He does nothing at all until this notice convening the extraordinary meeting has been issued and circulated, nor until four days before the F meeting. His contention now is that what he calls this irregularity in serving the notice upon him, renders it incompetent for the shareholders to pass the resolution to consider which they have had notice to meet. It appears to me that, if we gave effect to such an argument as this, we should be paralysing the whole course of business of these companies. It is competent for directors to call meetings, it is competent for shareholders to pass resolutions, and G the most that can be said here is that there is or may be some irregularity, but an irregularity (if such it be) which can be cured at any moment. In such cases the court never interferes. I think it is most important that the court should hold fast to the rule upon which it has always acted, not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularity complained of can be set right at H any moment. I am not at all sure, having regard to the mode in which, and the short notice upon which, those meetings of directors were held, that this gentleman could have complained of this meeting of directors as irregular, but I will assume that he could. If, at the time of receiving the notice of the board meeting, he had said to the secretary that he could not attend as the notice was too short, he might have had some case. I am not prepared, I however, to say that in consequence of the shortness of that notice the shareholders were incompetent to pass the special resolution they were convened to consider. If they confirm it tomorrow it appears to me that their doing so will be entirely valid, and I am of opinion that this injunction ought not to have been granted.

It is to be noted that in *Browne v La Trinidad*, the plaintiff did not complain that the meeting was convened at such a short notice, he did not even say that it was inconvenient for him to attend the meeting neither did he ask that the meeting be adjourned. The court of appeal decided that the meeting was not irregular and set aside the injunction grant by Charles J. A

In *Bentley-Stevens v Jones & Ors* [1974] 2 All ER 653; [1974] 1 WLR 638, the facts were that the plaintiff happened to be away from home for the weekend and did not receive the notice of meeting until 9 o'clock on the Monday evening when he got back. Nor did he receive a telephone call which the first defendant made to him or tried to make to him on the Sunday because there was nobody there to answer the telephone. By Monday evening when the plaintiff received the notice, the meeting was already held at 9.30 in the morning and a resolution was passed to remove him as a director. Plowman J decided that this was only an irregularity which could be cured. He relied on *Browne v La Trinidad* (1888) 37 Ch D 1. B C

In *Re Portuguese Consolidated Copper Mines Ltd* (1889) 42 Ch 160, the directors had no notice of the meeting and the court decided that the meeting was invalid. D

In *La Compagnie de Mayville v Whitley* [1896] 1 Ch 788, the facts were that S received a notice that a board meeting would be held on 24 February. On 24 February, S did not attend. S then sought a declaration that the resolutions of 24 February were void but the Court of Appeal held that the resolutions of 24 February were valid. E

From the cases cited above, it is clear that where a few hours' notice is given for a board meeting and two of the directors are not able to attend the meeting due to the short notice, or where no notice is given because the director is abroad, a meeting held pursuant to that notice is void. But if the directors who receive the short notice of meeting make no objections to the short notice or make no request that the meeting be adjourned to another date, such meeting is valid. Where the notice of meeting does not reach the directors because they are abroad, the meeting is only an irregularity which can be set right at any moment. In order to determine whether sufficient notice is given to directors, the court has to examine the previous practice of the board of directors in calling the meeting. In *Homer*'s case (1888) 39 Ch D 546, the few hours notice had never been previously given in the history of the company. F G

Where the memorandum and articles expressly specify the duration of the notice of meeting of the board of directors, the board must strictly comply with that rule. Non-compliance with that rule will render the meeting ineffective and the resolutions passed at the meeting invalid. See *First Nominee (Pte) Ltd v New Kok Ann Realty Sdn Bhd & Anor* [1983] 2 MLJ 76. H

In the present case, Dr Mahesan and Dr Ampikai had at least five days' notice of the board meeting. Dr Mahesan requested for an adjourment on the grounds that it was a short notice and that he required particulars on the allegations made against him as stated in the agenda. I

A It is now necessary to see what the previous practice of the company was with regard to notice of meetings of directors. I have examined the previous notices exhibited to encl 7 and I note that for the 9th directors' meeting, two days' notice was given, the 14th directors' meeting, one day's notice was given; 15th directors' meeting, six days' notice was given and B the 18th directors' meeting, six days' notice was given. It appears that the previous practice was not consistent ranging from one day's notice to six days' notice. After considering the previous practice, I am satisfied that the five days' notice given to Dr Mahesan and Dr Ampikai was a sufficient notice for the meeting on 25 April.

C Now I turn to Dr Mahesan's request for particulars regarding the allegations. In the notice quoted above, an agenda of the meeting is also included. In my opinion an agenda of the business to be transacted at the meeting is not required in law to be given. In *Eastern Resources of Australia Ltd v Glass Reinforced Products (GRP) Pty Ltd* 10 ACLR 496, Connolly J said at p 500 that 'there is not any general requirement that the business D to be conducted at a meeting of directors be specified in the notice calling the meeting ...'. In *La Compagnie* [1896] 2 Ch 788, Lindley LJ at p 797 said:

> The great point is whether, when a directors' meeting is to be held, it is necessary to give a notice not only of the meeting, but of the business to be E transacted at the meeting. I am not prepared to say as a matter of law that it is necessary ... I cannot now say ... that as a matter of law the business conducted at a directors' meeting is invalid if the directors have had no notice of the kind of business which is to come before them.

Since in law, the business to be transacted at the meeting of directors is not F required to be included in the notice, it is therefore not the requirement of the law that the agenda be included in the said notice. In the circumstances Dr Mahesan has no reason to complain that he did not have the particulars of the allegations since the secretary was not obliged to provide the particulars in the notice.

G From what I have stated above, I am of the opinion:

(a) that the notice of the board of directors' meeting dated 15 April 1994 is valid in law;

(b) that the notice of the meeting was duly served on the plaintiffs;

(c) that in the circumstances of this case, sufficient time was given to the H Dr Mahesan and Dr Ampikai to attend the 19th board of directors' meeting; and

(d) that all proceedings and minutes of the board of directors' meeting held on 25 April 1994 are valid.

Mr Thangaraj drew the attention of the court to another notice of the I board meeting dated 9 May 1994, which was to be held on 14 May 1994. One of the items on the agenda was on the question of allotment of shares. Dr Mahesan and Dr Ampikai did not attend the said meeting. On 14 May 1994 the board meeting was duly held and according to the minutes of the

meeting exhibited to Dr Mahesan's affidavit (encl 21), the allotment of shares was as follow:

Allotment of shares

Mr Anthuan Ratos briefed the board that this exercise is needed for the purpose as agreed in Agenda No 4 above and also for specific reason that Dr Radha who has been with the company for 16 years wants to resign and to opt out. No doubt Dr S Mahesan's latest behaviour is a large negative contributor to Dr Radha's decision.

Mr Anthuan Ratos reported that Dr Radha, being one of the subscribers to the memorandum and articles of the company in 1981, had stated that she should be entitled to increase ownership and control of the company. She also claimed that she was the longest serving director and the oldest shareholder.

Mr Anthuan Ratos further stated that as more funds will be required by the company during the period from now to 31 December 1994, in addition to funds generated from trading operations, an allotment of shares is required.

A discussion followed and the meeting agreed that:

(a) Under the authority given to the board by the members at the last AGM, all of the unissued shares in the company amounting to 240,000 ordinary shares be now allotted at par and the call on the shares as allotted is hereby made and is payable by instalments on each share so allotted in the following manner:

			Place of payment
By noon on 30 May 1994	—	10%	Registered office
By noon on 30 June 1994	—	30%	Registered office
By noon on 30 July 1994	—	50%	Registered office
By noon on 30 August 1994	—	10%	Registered office

(b) To ensure that controlling interest is not transferred to any single member but instead vested in the two working directors of the company in equal proportions, the shares be allotted in the following manner:

	Existing	Now allotted	After allotment	%
Dr S Mahesan (including interests through connected persons)	208,000	17,000	225,000	45
Dr Radha Waman Gawankar (including interests through connected persons)	26,000	199,000	225,000	45
Dr Leela Ratos (including interests through connected persons)	26,000	24,000	50,000	10
	260,000	240,000	500,000	100

The meeting also noted that the granting of controlling interest in the company to dedicated long-serving working directors had always been the

A policy of Dr Leela Ratos and was also practised with all other companies carrying her name.

Mr Thangaraj submitted that the said allotment of shares was contrary to art 14 of the memorandum and articles of the company. Article 14 provides as follow:

B

> The shares in the capital of the company for the time being unissued shall be at the disposal of the directors, and they may allot, grant options over or otherwise dispose of them to such persons, at such times, and on such terms as they think proper, but so that no shares shall be issued which shall have the effect of transferring a controlling interest without the prior approval of the members in general meeting. No shares shall be issued at a discount,
>
C except in accordance with the Act.

In *Piercy v S Mills & Co Ltd* [1920] 1 Ch 77, the headnote states:

> A power to issue shares in a limited company given to directors for the purpose of enabling them to raise capital when required for the purpose of the company is a fiduciary power to be exercised by them bona fide for the
>
D general advantage of the company, and when the company is in no need of further capital, directors are not entitled to use their power of issuing shares merely for the purpose of maintaining their control, or the control of themselves and their friends, over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders.

E In *Hogg v Cramphorn Ltd* [1967] Ch 254; [1966] 3 All ER 420; [1966] 3 WLR 995, the court decided that the power to issue shares was a fiduciary power, and if exercised for an improper motive the issue of such shares was liable to be set aside, it being immaterial that the issue was made in the bona fide belief that it was in the interests of the company.

F In my opinion, the decision on the allotment of shares at the directors' meeting held on 14 May 1994 is ultra vires art 14 of the articles of association and contrary to the common law principle as laid down in *Piercy v S Mills* and *Hogg v Cramphorn* and therefore null and void. After considering all the circumstances of this case I am satisfied that the decision on the allotment of shares was not done in good faith and the
G defendants had exercised their fiduciary power with improper motive.

Mr Thangaraj asked the court to declare that the allotment of shares is null and void. However the originating summons does not contain any prayer to that effect.

Mr Thangaraj, then asked for leave to amend the originating summons
H to include a prayer for declaration that the allotment of shares at the board meeting held on 14 May 1994 is null and void. Mr Ong objected to the application for amendment. He referred to *Eshelby v Federated European Bank Ltd* [1932] 1 KB 254, where the court decided that an amendment was not justified, in so far as it admitted a new cause of action which did
I not exist at the date at the issue of the writ. The decision was upheld by the Court of Appeal. See [1931] WN 244.

Alternatively, Mr Thangaraj asked the court to declare that the allotment of shares is null and void under prayer (h), namely, 'such further

order or other relief as this court may deem fit'. He submitted that the court has a discretion to make a declaratory order. Mr Ong objected to the request and submitted that the plaintiff cannot under a general prayer for further relief obtain any relief inconsistent with that relief which is expressly asked for. He cited *Mokhtar v Arumugam* [1959] MLJ 232.

In my opinion the allotment of shares affects the rights of Dr Mahesan and Dr Ampikai as they control 80% of the shares. With the allotment of shares, the defendants will control 55% of the shares. I have already said that the decision on the allotment of shares is null and void.

The question to be considered here is whether the court has the power to make an order declaring that the allotment of shares at the board of directors meeting held on 14 May 1994 is null and void.

In *Harrison-Broadley & Ors v Smith* [1964] 1 All ER 867; [1964] 1 WLR 456, the plaintiffs issued a writ claiming an injunction to restrain the defendant from entering an about 170 acres of land and from remaining in or using a mansion house on the land. The Court of Appeal decided that it was not proper for the court to grant an injunction in the circumstances of that case but instead made a declaratory order against the defendant even though declaration was not claimed on the pleading. In his judgment ([1964] 1 All ER 867 at p 873; [1964] 1 WLR 456 at p 466), Harman LJ said:

> It is very awkward that no declaration is asked for on the claim; no further relief is asked for. Nothing is asked for except these two injunctions, which I do not think that it is proper to give. The Rules of the Supreme Court, however, do, I think, entitle us to grant declaratory relief if that be the right thing to do; and in *Hulton v Hulton* [1916] 2 KB 642, cited to us this morning, it does appear from the judgment of Lush J, that it is, if necessary, within the power of the court, although a declaration be not asked for, to grant one. On that part of the case I should propose, subject to what my brothers say, that this court should grant a proper declaration declaring that the defendant does not enjoy, either alone or jointly with the second plaintiff, an agricultural tenancy of this land within the meaning of the Agricultural Holdings Act 1948.

In *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, the plaintiffs issued a writ claming a declaration that the plaintiffs were not liable to repay to the defendants any sum paid by them in respect of bills of exchange. The plaintiff also asked for other declaratory orders and an injunction. The defendant applied to strike out the writ on the ground that it disclosed no cause of action. Bailhache J held that he had jusdiction to entertain the claim for the declarations and dismissed the defendant's application. The defendant appealed. The Court of Appeal dismissed the appeal. In his judgment at p 562, Pickford LJ said:

> I think therefore that the effect of the rule is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration.

A At pp 564–565, Pickford LJ went on to state:

> I think that a declaration that a person is not liable in an existing or possible action is one that will hardly even be made ... but taking the large view that I do of the effect of O XXV r 5, I am not prepared to say that it is beyond the power of the court in a very exceptional case to make such a declaration, and that the fact of its being asked for a purpose which the court does not approve does not take away the power to make it ...
>
> I think, therefore, that there is jusdiction to make this declaration ... In my opinion the appeal should be dismissed ...

In *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101, the applicant by originating summons applied to the court for a declaration:

(a) ... that he is a person belonging to the State of Sabah ...;

(b) ... that he is a permanent resident of the State of Sabah ...;

(c) ... that his right to remain in Sabah ... is still subsisting and that he cannot be deprived of that right ...; and

(d) that the entry permit conferring permanent resident status on him in Sabah cannot lawfully be cancelled ...

He also asked for an alternative prayer for a declaration. The application was dated 27 May 1976. The affidavit in support had been affirmed on 27 April 1976 and a supplementary affidavit on 22 May 1976. Before the hearing of the application, a second supplementary affidavit was affirmed on 26 April 1977, ie almost one year after the filing of the originating summons. In the supplementary affidavit, the applicant alleged that during the previous 11 months the Sabah Government had taken various steps to harass him politically and economically. The learned judge declined to grant the declarations sought on the ground that the application was premature and that the matter would be more appropriately dealt with under the special machinery provided by the Immigration Act 1959. The applicant appealed. At the hearing of the appeal before the Federal Court, Mr Mooney for the applicant complained that the learned judge did not deal with the right which was threatened. Encik Fong Seng Yee for the Government of Malaysia submitted that the threat of expulsion was absent at the time of application. The Federal Court allowed the appeal and granted the four declarations sought by the applicant. In his judgment at p 107, Lee Hun Hoe CJ (Borneo) said:

> The basis of the jurisdiction is O 25 r 5 of the Rules of the Supreme Court. The prevailing view seems to be that the court's jusdiction to make a declaratory order is unlimited subject only to its own discretion ...
>
> It is the submission of the appellant that he has no other remedy of establishing his right to reside in Sabah. The declaration sought is not as to his future right but as to his present right. There has been a threat to his right by official statement of the party in power. The threat has never been denied or withdrawn ... As to the determination of future right its importance for certain purposes is not in doubt, particularly when a mere declaration is usually the only remedy ...

From the three cases cited above, it is clear that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion.

The court has the power to grant a declaration irrespective of whether the applicant has a cause of action or not. The court has the discretion to grant a declaration even if the cause of action does not exist at the time of the filing of the application.

In the present case, the allotment of shares took place after the plaintiffs had filed the originating summons and the affidavit in support affirmed on 25 April 1994. In his further affidavit affirmed on 11 May 1994 (encl 13), Dr Mahesan averred that the allotment of shares as stated in item 6 of the agenda in the notice of the board of directors' meeting dated 9 May 1994 contravened the provisions of the Companies Act 1965. Exhibited to the affidavit is a copy of the notice of directors' meeting held on 14 May 1994 together with the agenda. In his Further Affidavit III affirmed on 23 May 1994 (encl 21), Dr Mahesan said that on 23 May 1994 at 4.30pm he received the minutes of the 20th board of directors' meeting held on 14 May 1994. A copy of the said minutes is exhibited to the affidavit. The first plaintiff therefore received the minutes of the 20th board meeting one day before the commencement of the hearing of the originating summons and encl 11.

The decision on the allotment of shares would deprive Dr Mahesan and Dr Ampikai of a substantial amount of their shares in the company. I think it is necessary for the court to exercise its discretion to grant the declaration. The question of amending the originating summons does not arise here.

For the reasons stated above I dismiss prayers (a), (b), (c) and (d) of the application, and make the following order:

(1) a declaration that the allotment of shares decided at the 20th board of meeting held on 14 May 1994 is null and void and of no effect whatsoever; and

(2) the defendants will pay the plaintiffs the costs of this application to be taxed.

I make no order on encl (11).

Order accordingly.

Reported by Anne Khoo